

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CALIFORNIA COMMUNITIES  
AGAINST TOXICS, *et al.*,

*Petitioners,*

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

*Respondents.*

**Case No. 21-1024  
(consolidated with  
No. 21-1034)**

**UNOPPOSED JOINT MOTION TO SEVER AND HOLD IN ABEYANCE  
SEVERAL ISSUES BEFORE THE COURT AND ESTABLISH BRIEFING  
SCHEDULE FOR REMAINING ISSUES**

Petitioners State of California, State of Delaware, State of Illinois,  
Commonwealth of Massachusetts, State of New Jersey, State of New York, State  
of Oregon, State of Rhode Island, State of Washington, State of Wisconsin, City of  
Chicago, and City of New York, and Environmental Petitioners in Case No. 21-  
1024<sup>1</sup> (collectively, “Joint Petitioners”) jointly submit this unopposed motion for

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<sup>1</sup> California Communities Against Toxics, Downwinders at Risk, Environmental Defense Fund, Environmental Integrity Project, Hoosier Environmental Council, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, Sierra Club, and Texas Environmental Justice Advocacy Services.

the Court’s consideration. Pursuant to the Court’s Order on August 15, 2025 directing the parties to file motions to govern future proceedings by September 4, 2025, Joint Petitioners move to sever and hold in abeyance several issues raised by petitioners under a new docket number, as set forth below. For the remaining issues to be briefed, the Joint Petitioners move to remove the case from abeyance and establish the briefing schedule, format, and word limits proposed below. Petitioners Commonwealth of Virginia and Commonwealth of Pennsylvania take no position on this motion. EPA takes no position on the request to sever and is unopposed to the proposed briefing schedule. The motion is unopposed by respondent-intervenors.

## **BACKGROUND**

These consolidated cases challenge a United States Environmental Protection Agency (“EPA”) action published in November 2020, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 85 Fed. Reg. 73,854 (Nov. 19, 2020) (“2020 Rule”). In the 2020 Rule, EPA took two distinct actions relevant here. First, EPA adopted regulatory provisions addressing the ability of stationary sources of hazardous air pollutants to reclassify from major to area-source status under Section 112 of the Clean Air Act. *Id.* at 73,863. Second, EPA revised the definition of a source’s “potential to emit” for purposes of determining whether a facility is a major source under Section 112. *Id.* at 73,876.

In the 2020 Rule, EPA referred to this second action as an “interim ministerial revision” that was “not the EPA's final decision” on the definition of potential to emit, but instead intended only to remain in place while “EPA continues to consider the comments on this aspect of the proposal.” *Id.* Some petitioners filed a petition for reconsideration of EPA’s second action under the 2020 Rule, raising *inter alia* EPA’s failure to comply with the Clean Air Act’s procedural requirements by failing to provide adequate notice and opportunity for comment as to EPA’s final decision. EPA has not yet ruled on that request.

In January 2021, petitioners in Case No. 21-1024 (“Environmental Petitioners”) and Case No. 21-1034 (“State Petitioners”) filed petitions for review of the 2020 Rule. The cases were consolidated and have remained in abeyance since March 31, 2021, with the Court granting multiple unopposed motions by EPA to extend the abeyance during that period. In addition, members of those petitioner groups also separately filed petitions for administrative reconsideration with EPA, pursuant to Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d). Petition for Reconsideration of Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, from State of California et al. (Jan. 19, 2021), EPA-HQ-OAR-2019-0282-0658, <https://www.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0658>; Petition for Reconsideration of Reclassification of Major Sources as Area Sources Under

Section 112 of the Clean Air Act, from Sierra Club et al., (Jan. 18, 2021), EPA-HQ-OAR-2019-0282-0659, <https://www.regulations.gov/comment/EPA-HQ-OAR-2019-0282-0659>.

While this litigation remained in abeyance, EPA reviewed the 2020 Rule and published a new rule governing the effect of reclassification on certain sources. “Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act.” 89 Fed. Reg. 73,293 (Sept. 10, 2024) (“2024 Rule”). The 2024 Rule did not take any action with respect to the definition of “potential to emit,” but instead said that EPA would “continue[] to consider” that issue and address it in a separate final action. *Id.* at 73,298-99.

Some petitioners also challenged the 2024 Rule before this Court. *Environmental Defense Fund, et al. v. EPA*, No. 24-1354. On June 20, 2025, the President signed a joint resolution disapproving the 2024 Rule under the Congressional Review Act, Pub. L. No. 119-20; EPA, ECF No. 2128808 (D.C. Cir. filed Aug. 5, 2025) (EPA’s Status Report noting the Congressional Review Act resolution of the 2024 Rule).

Since that resolution was passed, the parties have discussed a briefing schedule for the challenge to the 2020 Rule, and have agreed to the proposed severance of issues and briefing schedule described below.

## **I. REQUEST TO SEVER AND HOLD IN ABEYANCE SEVERAL ISSUES BEFORE THE COURT**

Joint Petitioners respectfully request that the Court sever and hold in abeyance several issues specified below to allow this case's briefing to focus solely on EPA's first action under the 2020 Rule, which addressed at what point, if ever, "major" sources under Section 112 of the Clean Air Act can reclassify as "area" sources ("Reclassification Timing Issues"). The statements of issues by State Petitioners, ECF No. 1887288 (D.C. Cir. filed Feb. 25, 2021), and by Environmental Petitioners, ECF No. 1886595 (D.C. Cir. filed Feb. 22, 2021) identify two distinct groups of issues for briefing. Issues 1-3 in both filings describe the Reclassification Timing Issues.

As expressed in State Petitioners' statement of issues, the Reclassification Timing Issues are:

1. Whether the 2020 Rule violates Section 112 of the Clean Air Act, 42 U.S.C. § 7412, or is arbitrary and capricious, because it allows major sources of hazardous air pollutants to be reclassified as non-major "area" sources and avoid congressionally mandated requirements applicable to major sources.
2. Whether EPA exceeded its statutory authority or acted unlawfully by allowing major sources of hazardous air pollutants to be reclassified as non-

major “area” sources and avoid congressionally mandated requirements applicable to major sources.

3. Whether, even if major sources of hazardous air pollutants could reclassify as non-major “area” sources, EPA exceeded its statutory authority, acted unlawfully, or promulgated an arbitrary and capricious final rule by allowing such reclassification to automatically absolve a major source’s obligation to achieve the “maximum degree of reductions” or otherwise permitting increases in the source’s emissions.

As expressed in Environmental Petitioners’ statement of issues, the Reclassification Timing Issues are:

1. Whether EPA’s interpretation of the Clean Air Act as permitting sources to reclassify as “area sources” at any time conflicts with the statutory text or is otherwise unlawful.
2. Whether, even if the Clean Air Act permits sources to reclassify as “area sources” at any time, EPA’s interpretation of the Clean Air Act as automatically relieving such reclassified sources of their obligation to comply with “maximum achievable control technology” (MACT) standards previously promulgated under 42 U.S.C. § 7412(d)(2)-(3) conflicts with the statutory text or is otherwise unlawful.

3. Whether EPA failed to consider all important aspects of the problem before it in deciding to permit sources to reclassify as area sources and thereby cease complying with MACT standards, so as to render its decision arbitrary and unlawful.

The remaining issues in both petitioners' statements of issues relate to EPA's second action under the 2020 Rule, revising the regulatory definition of "potential to emit" at 40 C.F.R. section 63.2 ("PTE Issues"). Joint Petitioners move to sever and hold in abeyance those PTE Issues under a new docket number for the following reasons. First, as discussed above, EPA stated in the 2024 Rule that it would "continue[] to consider" the definition of "potential to emit," and would address it in a separate final action. 89 Fed. Reg. 73,298-99. Moreover, EPA has not yet ruled on the pending petition for reconsideration concerning EPA's compliance with the Clean Air Act's notice-and-comment requirements as to its change to the definition of "potential to emit." *See EME Homer City Generation v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015) (As "EPA has not ruled" on request for reconsideration, the court cannot address claim that "EPA violated the Clean Air Act's notice and comment requirements by significantly amending the Rule between proposed and final versions without providing additional opportunity for notice and comment."). As EPA continues to consider those issues, the parties agree that severance of the PTE Issues and holding the PTE Issues in abeyance

would facilitate resolution of the Reclassification Timing Issues via the briefing schedule proposed in the following section.

## **II. REQUEST TO ESTABLISH BRIEFING SCHEDULE FOR ISSUES TO BE REMOVED FROM ABEYANCE**

Joint Petitioners request the Court to lift the abeyance and establish the proposed briefing schedule and format:

- State Petitioners and Environmental Petitioners shall file opening proof briefs in support of their petitions for review on or before January 23, 2026.
- Respondents shall file their proof brief on or before April 10, 2026.
- Respondent-Intervenors shall file their proof brief on or before April 17, 2026.
- State Petitioners and Environmental Petitioners shall file reply proof briefs on or before May 22, 2026.
- The deferred joint appendix will be due June 11, 2026. Pursuant to D.C. Cir. Rule 30 and Fed. R. App. P. 30, the parties agree and jointly request leave to file and utilize a deferred appendix for briefing.
- All parties shall file final briefs on or before June 18, 2026.

Joint Petitioners propose the following word limits for briefing:

- State Petitioners and Environmental Petitioners' initial briefs shall be limited to 13,000 words in the aggregate.

- Respondents' brief shall be limited to 13,000 words.
- Respondent-Intervenors' brief shall be limited to 9,100 words.
- State Petitioners and Environmental Petitioners' reply briefs shall be limited to 6,500 words in the aggregate.

Dated: September 4, 2025

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 4, 2025, I caused a copy of the foregoing **UNOPPOSED JOINT MOTION TO SEVER AND HOLD IN ABEYANCE SEVERAL ISSUES BEFORE THE COURT AND ESTABLISH BRIEFING SCHEDULE FOR REMAINING ISSUES** to be filed with the Clerk of the Court using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Kartik Raj  
KARTIK RAJ

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing **UNOPPOSED JOINT MOTION TO SEVER AND HOLD IN ABEYANCE SEVERAL ISSUES BEFORE THE COURT AND ESTABLISH BRIEFING SCHEDULE FOR REMAINING ISSUES** is printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word, it contains 2,416 words.

/s/ Kartik Raj  
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